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**ADMIRALTY INSTRUCTIONS**  
for  
EIGHTH CIRCUIT MANUAL OF  
MODEL JURY INSTRUCTIONS (CIVIL)

Submitted by:  
David D. Noce, U.S. Magistrate Judge  
James W. Herron, Esq.  
Gary T. Sacks, Esq.

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## ADMIRALTY INSTRUCTIONS

### 8.00 INTRODUCTION

The territorial bounds of the district courts of the Eighth Circuit include large portions of the Missouri and Mississippi Rivers, the longest inland river system in the United States. On this river system moves most of the inland waterborne commerce in America. The jurisprudence of the Eighth Circuit has generated opinions on many admiralty and maritime disputes and issues. To facilitate the submission of such issues to juries in federal judicial actions, the jury instructions that follow this introduction are submitted.

Admiralty and maritime jury trials occur in actions brought by employees against employers and by invitees against the owners and operators of business premises. There are issues unique and issues common to each type of claim. The rules of decision for such cases may be found in the rich maritime common law precedents of the federal courts and in Congressional legislation.

#### General Maritime Law

The admiralty and maritime common law of the courts of the United States provides rules of decision for claims brought by non-employee invitees on vessels on navigable waters. Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 814-16 (2001); The Max Morris, 137 U.S. 1, 14 (1890); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959). Such claimants may bring a claim for negligence, subject to a reduction of damages (not a complete defense) for comparative negligence or fault. Kermarec, 358 U.S. at 629, 630.

We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

Id. at 632. However, admiralty law does not provide a non-employee a claim for unseaworthiness of the subject vessel. Id. at 629.

Recently, the Supreme Court stated:

It is settled that the general maritime law imposes duties to avoid unseaworthiness and negligence . . . , that non-fatal injuries caused by the breach of either duty are compensable . . . , and that death caused by breach of the duty of seaworthiness is also compensable.

Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. at 813. The Supreme Court recognized for the first time in Garris a wrongful death claim under general maritime law based upon negligence. Id.

More generally, the Supreme Court has held, "when a statute resolves a particular issue, we have held that the general maritime law must comply with that resolution." Id. at 1931.

Further, "even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes." Id.

### **Suits by Employees**

Employee claimants are immediately faced with determining whether to bring suit for compensatory damages under general maritime law, the Jones Act, or to seek workers' compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA) or the applicable state's workers' compensation laws. Johnson v. Cont'l Grain Co., 58 F.3d 1232, 1235 (8th Cir. 1995) (a Jones Act seaman "is excluded from coverage under the LHWCA and vice versa"). A worker covered by the LHWCA may not recover on a theory of unseaworthiness of the vessel. Id.

### **The Jones Act**

The federal Jones Act provides in part that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. § 688(a). The Jones Act allows only to a seaman a negligence action for either personal injury or wrongful death against the seaman's employer. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995); Britton v. U.S.S. Great Lakes Fleet, Inc., 302 F.3d 812, 816 (8th Cir. 2002) (quoting Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001)); Shows v. Harber, 575 F.2d 1253, 1254 (8th Cir. 1978).

By incorporating the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (FELA), the Jones Act imports and applies FELA doctrines of negligence and comparative negligence and abolishes the defense of assumption of the risk. Scindia Steam Navigation Co. v. DeLos Santos, 451 U.S. 156, 166 n.13 (1981); Ballard v. River Fleets, Inc., 149 F.3d 829, 831 (8th Cir. 1998); Miller v. Patton-Tully Transp. Co., 851 F.2d 202, 205 (8th Cir. 1988).

The broad scope of Jones Act liability has been described thus:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the

employer to pay damages for injury or death due "in whole or in part" to its negligence.

Clark v. Cent. States Dredging Co., 430 F.2d 63, 66 (8th Cir. 1970) (quoting Rogers v. Mo. Pac. R.R., 352 U.S. 500, 506-07 (1957)); see also Alholm v. Am. Steamship Co., 144 F.3d 1172, 1178 (8th Cir. 1998).

The Jones Act is to be liberally construed "to accomplish its beneficial purposes." Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949).

### **Unseaworthiness**

The Eighth Circuit described the claim of unseaworthiness:

"Unseaworthiness is a claim under general maritime law based on the vessel owner's duty to ensure that the vessel is reasonably fit to be at sea." Lewis, 531 U.S. at 441 . . . . It is a cause of action distinct from Jones Act negligence, which can be found without a corresponding finding of unseaworthiness.

The warranty of seaworthiness . . . requires that the ship, including the hull, decks, and machinery, "be reasonably fit for the purpose for which they are used." In re Matter of Hechinger, 890 F.2d 202, 207 (9th Cir. 1989) (citation omitted). Examples of conditions that can render a vessel unseaworthy include defective gear appurtenances in disrepair, insufficient manpower, unfit crew, and improper methods of loading or stowing cargo. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971) . . . . The burden of proof in demonstrating unseaworthiness rests on the plaintiff, who must show by a preponderance of the evidence that the unseaworthiness was a proximate cause of the injury. Alvarez v. J. Ray McDermott & Co., Inc., 674 F.2d 1037, 1042 n.3 (5th Cir. 1982). Under these circumstances, proximate cause means: "first, that the unseaworthiness . . . played a substantial part in bringing about or actually causing the injury; and two, that the injury was either a direct result of a reasonable probable consequence of the unseaworthiness." Id.

Britton, 302 F.3d at 818.

### Seaman

"To recover from his employer under either the Jones Act or the general maritime law, a plaintiff must be a 'seaman.'" Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d 560, 565 (5th Cir. 1995). The Jones Act does not define the term "seaman." Whether or not a worker is a seaman "is usually a fact-intensive inquiry properly left to the jury to resolve." Johnson v. Cont. Grain Company, 58 F.3d at 1235. In determining who are and who are not Jones Act seamen, Supreme Court opinions and those of federal courts of appeals have distinguished between maritime workers whose employment is land-based and those whose employment is vessel-based. A "seaman" is an employee whose "duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and nature." Chandris, Inc. v. Latsis, 515 U.S. at 369; see also Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 554 (1997). Stated another way,

A finder of fact can conclude that a workman was a member of a crew of a vessel if:

(1) the injured workman performed at least a substantial part of his work on the vessel or was assigned permanently to the vessel; and

(2) the capacity in which the workman was employed and the duties which he performed contributed to the function of the vessel or to accomplishment of its mission.

Miller v. Patton-Tully Transp. Co., 851 F.2d at 204 (quoting Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 510 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975)); see also Johnson, 58 F.3d at 1235-36.



A Jones Act "seaman" need not be assigned to a specific vessel; he retains his "seaman" status if assigned to a group of Jones Act vessels under common ownership or control. Harbor Tug & Barge Co. v. Papai, 520 U.S. at 556. Such a fleet of vessels "must take their direction from one identifiable central authority." Johnson, 58 F.3d at 1236 (quoting Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1258 (2d Cir. 1994)).

In determining whether or not an employee is a "seaman," a court must look not only to the nature of the activity in which the claimant was injured, but in the overall nature of the employee's work, whether he or she performs a substantial amount of work on board a "vessel," with regularity and continuity. In Chandris, the Supreme Court established a guideline from which courts can vary depending upon the circumstances of the case: "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." 515 U.S. at 371.

There is no such guideline, however, for "determining whether an injured worker is substantially connected to a vessel." Lara v. Harvey's Iowa Mgmt. Co., 109 F.Supp.2d 1031, 1034 (S.D. Iowa 2000). An injured worker might be a Jones Act seaman without having worked on board the vessel when it was in transit. Id. at 1036. Further, an employer's consideration of an injured worker as a Jones Act "seaman" by the payment of maritime "cure" may be relevant in determining seaman status. Id. "[T]he determinative factor is the employee's connection to a vessel, not the employee's particular job." Johnson, 58 F.3d at 1236.

### **Vessel in Navigation**

An employee-claimant can be a "seaman" under the Jones Act only if he or she is assigned to a "vessel in navigation."

"[W]hether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide." Chandris, Inc. v. Latsis, 515 U.S. at 373. Concomitantly, when the alleged incident occurred the vessel involved must have been situated on navigable waters. Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d at 568.

However, neither the Jones Act nor the Supreme Court have defined "vessel." Therefore, district courts must look to the several federal courts of appeals for the applicable definitions of "vessel." Generally, the Eighth Circuit has held that a Jones Act vessel is "virtually any floating structure used for transport in navigable waters." Slatton, 506 F.2d at 505 (involving a barge in navigable waters on which men worked on a maritime installation).

Both self-propelled maritime structures and those that are towed may be Jones Act "vessels." However, the majority of federal courts of appeals has determined that a barge or other floating platform is not a Jones Act "vessel" if (1) it was primarily used as a work platform; (2) the structure was indefinitely moored at the time of the incident; and (3) any ability of the structure to move was incidental to its primary purpose as a work platform. Tonnesen v. Yonkers Contracting Co., 82 F.3d 30, 36 (2d Cir. 1996); Digiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1123 (1st Cir. 1992 (en banc)); Ellender v. Kiva Constr. Eng'g, Inc., 909 F.2d 803, 806 (5th Cir. 1990); Pavone, 52 F.3d at 570; Hurst v. Pilings & Structures, Inc., 896 F.2d 504, 506 (11th Cir. 1990).

In determining whether a non-self-propelled structure is a Jones Act "vessel" courts consider its function and use by the owner. Relevant factors include whether it has navigational aids, a raked bow, lifeboats or other lifesaving equipment, bilge pumps, quarters for a crew, and registration

as a vessel with the Coast Guard. Michel v. Total Transp., Inc., 957 F.2d 186, 190 (5th Cir. 1992).

A Jones Act "vessel" does not necessarily lose its status of being "in navigation," merely because for a period of time it is not voyaging, is moored, or is engaged in loading or unloading. Digiovanni, 939 F.2d at 1121. However, a structure that is more or less permanently affixed to shore is not a vessel in navigation. Pavone, 52 F.3d at 569.

### **Longshore and Harbor Workers' Compensation Act (LHWCA)**

The Supreme Court has described the facets of the LHWCA generally thus:

[T]he Longshore and Harbor Workers' Compensation Act (LHWCA) . . . , 33 U.S.C. § 901 et seq., provides nonseaman maritime workers . . . with no-fault workers' compensation claims (against their employer, § 904(b)) and negligence claims (against the vessel, § 905(b)) for injury and death. As to those two defendants, the LHWCA expressly pre-empts all other claims, §§ 905(a), (b) . . . , but it expressly preserves all claims against third parties [(those who neither employed the claimant nor owned the vessel involved in the incident)], §§ 933(a), (i).

Garris, 532 U.S. at 818.

### **§ 905(b) of LHWCA**

Injured maritime workers who are not Jones Act seamen may be able to recover under the LHWCA. Section 905(b) allows a longshoreworker to seek compensation for injuries caused by the negligence, but not the unseaworthiness, of a vessel:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of § 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly . . . . The liability of the vessel under the subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided

in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

Section 905(b) does not define the bounds of actionable negligence. Reed v. ULS Corp., 178 F.3d 988, 990-91 (8th Cir. 1999). The Eighth Circuit has recognized that the owner of a vessel owes longshoremen three duties:

The first, which courts have come to call the "turnover duty," related to the condition of the vessel upon the commencement of stevedoring operations . . . . The second duty, applicable once stevedoring operations have begun, provides that a vessel owner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." . . . The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Id. at 991 (citing Howlett v. Birkdale Shipping Co., 512 U.S. 92, 98 (1994), and Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 167).

However, under the statute such a claim is denied to a longshoreworker who was engaged in repair work. Johnson v. Cont. Grain Co., 58 F.3d at 1237. Section 905(b) also provides in part:

If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

33 U.S.C. § 905(b).

#### **§ 933 of LHWCA**

Under § 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933, a worker or the representative of his estate may seek damages for personal injuries against a non-employer, non-vessel-owner, third party. Also, under § 933 an employer has the right to recoup amounts paid under the LHWCA to the employee or the representative of the employee's estate in such a judicial action. See 33 U.S.C. § 933.

### **Wrongful Death**

A general maritime cause of action for wrongful death due to unseaworthiness was recognized in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). See Spiller v. Thomas M. Lowe, Jr., 466 F.2d 903, 905 (8th Cir. 1972). The United States Supreme Court has very recently recognized a claim under the general maritime law for the wrongful death of a non-seaman due to negligence. See Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811.

### **Punitive Damages**

Punitive damages are not recoverable by seamen<sup>1</sup> in personal injury claims under the Jones Act or under general maritime law. Miles v. Apex Marine Corp., 498 U.S. 19, 31 (1990) (a seaman's recovery under the Jones Act or general maritime law is limited to pecuniary losses); Alholm v. Am. Steamship Co., 144 F.3d at 1180-81; Horsley v. Mobile Oil Corp., 15 F.3d 200, 203 (1st Cir. 1994) (applying Miles to hold that punitive damages are not recoverable under general maritime law); Miller v. Am. Present Lines, Ltd., 989 F.2d

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<sup>1</sup>Some cases have allowed the recovery of punitive damages to non-seamen in maritime cases. In re Horizon Cruises Litigation, 2000 WL 685365 (S.D.N.Y. 2000) (acknowledges split among courts); contra In re Diamond B Marine Services, Inc., 2000 WL 222847 (E.D. La. 2000); O'Hara v. Celebrity Cruises, 979 F. Supp. 254 (S.D.N.Y. 1997).

1450, 1457 (6th Cir. 1993) (applying Miles to hold that punitive damages are not recoverable under the Jones Act).

### **Maintenance and Cure**

General maritime law requires a shipowner to pay an injured seaman maintenance and cure irrespective of any finding or not of any liability under the Jones Act or general maritime law; such a duty arises merely under the employment contract. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938); Britton, 302 F.3d at 815; Wactor v. Spartan Transp. Corp., 27 F.3d 347, 351-52 (8th Cir. 1994) (defining "maintenance" and "cure"; failure of seaman to disclose medical information before employment may be a defense to maintenance and cure); Stanislowski v. Upper River Servs., Inc., 6 F.3d 537, 540 (8th Cir. 1993).

A seaman's entitlement to maintenance and cure is independent of entitlement to damages for negligence under the Jones Act. Britton, 302 F.3d at 816. The recovery of compensatory damages, however, cannot duplicate moneys already recovered as maintenance and cure. Stanislowski, 6 F.3d at 540. Maintenance is an amount sufficient to provide the sick or injured seaman with food and lodging comparable to that he would have received on his vessel. Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 946 (9th Cir. 1986). Cure is reasonable medical treatment and services needed during the seaman's recovery. Calmar S.S. Corp. v. Taylor, 303 U.S. at 528.

Maintenance and cure might not be available, if the seaman was required to provide preemployment medical information and failed to do so or concealed material facts regarding the part of the plaintiff's body allegedly injured. Britton, 302 F.3d at 816; Wactor, 27 F.3d at 352. Before maintenance and cure is denied, "the employer must show that the nondisclosed medical information was material to its

decision to hire." Britton, 302 F.3d at 816. Maintenance and cure also may be denied if the seaman personally did not incur actual expenses for food and lodging. Hall v. Noble Drilling (U.S.) Inc., 242 F.3d 582, 588 (5th Cir. 2001).

### **Mitigation of Damages**

An injured seaman or other maritime worker must mitigate his or her damages by obtaining reasonable medical treatment. See, Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315, 319 (5th Cir. 1986); Young v. Am. Export Isbrandtsen Lines, Inc., 291 F. Supp. 447, 450 (S.D. N.Y. 1968).

### **Comparative Fault and the Settling Defendant(s)**

In an admiralty action, when a plaintiff settles with one of several joint tortfeasors, a nonsettling tortfeasor is responsible to the injured party for the nonsettling tortfeasor's proportionate share of the fault or responsibility in causing the injury. McDermott, Inc. v. AmClyde & River Don Castings, Ltd., 511 U.S. 202, 208-09 (1994). See Special Interrogatories, § 8.90, below.

#### **8.10 NEGLIGENCE CLAIM UNDER THE JONES ACT**

The law provides a remedy to any seaman who suffers personal injury in the course of his employment due to the negligence of his employer. Plaintiff has brought such a claim in this action under the Jones Act.

The Jones Act, however, does not make the employer the accident insurer of the seaman. Negligence on the part of the employer is necessary to recover under the Act.



## 8.10A NEGLIGENCE CLAIM UNDER THE JONES ACT--ELEMENTS

Your verdict must be for plaintiff [and against defendant]<sup>1</sup> on plaintiff's Jones Act claim if all the following elements have been proved by the [(greater weight) or (preponderance)]<sup>2</sup> of the evidence:

First, plaintiff was employed by defendant as a seaman on a vessel in navigation<sup>3</sup>;

Second, during the course of plaintiff's employment as a seaman, defendant [here describe the submitted act or omission]; and

Third, defendant in any one or more of the respects submitted in paragraph Second was negligent; and

Fourth, such negligence, in whole or in part, caused injury to the plaintiff.

### Committee Comments

See Shows v. Harber, 575 F.2d 1253, 1254 (8th Cir. 1978); Offshore Co. v. Robison, 266 F.2d 769, 773-74 (5th Cir. 1959); Petty v. Dakota Barge Serv., 730 F. Supp. 983, 985 (D. Minn. 1989).

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<sup>1</sup>Use this phrase if there is more than one defendant.

<sup>2</sup>Select the bracketed language that corresponds to the burden-of-proof instruction given.

<sup>3</sup>See Model Jury Instructions, §§ 8.15-8.17 (defining "seaman on a vessel in navigation"), below.

#### **8.11 JONES ACT--"COURSE OF EMPLOYMENT" DEFINED**

Under the Jones Act a seaman is injured in the course of his or her employment when, at the time of injury, he or she was doing the work of his or her employer, that is, he or she was working in the service of the vessel as a member of her crew.

#### **Committee Comments**

See Eleventh Circuit Pattern Jury Instructions (Civil), § 6.1, at 236-37 (West Group 2000).

#### 8.12 JONES ACT--"NEGLIGENCE" DEFINED

The terms "negligent" and "negligence," as used in these instructions, mean the failure to use reasonable care. "Reasonable care" means that degree of care which a reasonably careful person would use under the same or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under the same or similar circumstances, or in failing to do something that a reasonably careful person would do under the same or similar circumstances.

#### **Committee Comment**

See Eighth Circuit Manual of Model Jury Instructions (Civil), § 7.09 (West Group 2001); Ninth Circuit Manual of Model Jury Instructions (Civil), § 9.3 (West Group 2001).

### 8.13 JONES ACT--CAUSATION

If you find from the evidence in the case that defendant was negligent, then you must decide whether or not such negligence caused, in whole or in part, any injury or damages suffered by the plaintiff. Negligence may cause damage or injury, even if it operates in combination with the act of another or some natural cause, as long as the negligence played any part in causing the damage or injury.

[This standard is different from the causation required for a claim of unseaworthiness of a vessel. Under such a claim, an unseaworthy condition of a vessel caused damage or injury, if it was a proximate cause, in that it played a substantial part in bringing about the injury or damage, the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and except for the unseaworthy condition of the vessel the injury or damage would not have occurred. Unseaworthiness may be a proximate cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.]<sup>1</sup>

#### Committee Comment

See Eighth Circuit Manual of Model Jury Instructions (Civil) § 7 (FELA Introduction) and § 7.01 note 9 (causation under F.E.L.A.) (West Group 2001); Fifth Circuit Pattern Jury Instructions (Civil), § 4.6 (West Group 1999); Ninth Circuit Manual of Model Jury Instructions (Civil), §§ 9.4, 9.8 (West Group 2001); Eleventh Circuit Pattern Jury Instructions (Civil), § 6.1 (West Group 2000). See also, Alholm v. Am. Steamship Co., 144 F.3d 1172, 1180-81 (8th Cir. 1998).

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<sup>1</sup>Use the bracketed paragraph, if a claim for unseaworthiness is submitted to the jury along with a Jones Act claim.

#### 8.14 JONES ACT--CONTRIBUTORY NEGLIGENCE (COMPARATIVE FAULT)

Plaintiff has a duty to use the care that a reasonably careful seaman would use under the same or similar circumstances.

If you find in favor of plaintiff under Instruction No. \_\_\_\_ (here insert the number of plaintiff's elements instruction or verdict director), you must consider whether [(plaintiff) or (name of decedent)] was also negligent. Under this instruction, on plaintiff's [here identify the claim to which this instruction applies] claim, you must assess to plaintiff a percentage of the total negligence, if all the following elements have been proved by the [(greater weight) or (preponderance)] of the evidence:

First, [(plaintiff) or (name of decedent)] (describe the evidenced negligent conduct); and

Second, [(plaintiff) or (name of decedent)] was thereby negligent; and

Third, such negligence of [(plaintiff) or (name of decedent)] resulted in whole or in part in [(his) or (her)] own injury or damage.

The total percentages of the negligence of the [(plaintiff) or (name of decedent)] and of the defendant for causing [(plaintiff's) or (decedent's)] injury must equal 100 percent.

#### Committee Comment

See Eighth Circuit Manual of Model Jury Instructions (Civil), § 7.03 (West Group 2001) (regarding FELA claims); Fifth Circuit Pattern Jury Instructions (Civil), § 4.7 (West Group 1999); Ninth Circuit Manual of Model Jury Instructions (Civil), § 9.10 (West Group 2001). See also Ballard v. River Fleets, Inc., 149 F.3d 829, 831-32 (8th Cir. 1998); Alholm v. Am. Steamship Co., 144 F.3d 1172, 1179 (8th Cir. 1998).

## 8.15 "SEAMAN" DEFINED

A "seaman" is a [(sea) or (river) or (lake)]<sup>1</sup>-based maritime employee whose work regularly exposes him or her to the special hazards and disadvantages to which they who go down to the [(sea) or (rivers) or (lakes)]<sup>2</sup> in ships are subjected. The term "seaman" does not include a land-based worker who has only a temporary connection to a vessel in navigation, and therefore whose employment does not regularly expose him or her to the perils of the [(sea) or (river) or (lake)].<sup>3</sup> Rather, a "seaman" is a member of a crew of a vessel in navigation.

In order for you to find that plaintiff is a "seaman," you must find by the [(preponderance) or (greater weight)] of the evidence that, at the time of the incident for which plaintiff is claiming [(he) or (she)] was injured:

First, plaintiff had an employment-related connection to a vessel in navigation [or to an identifiable group of such vessels]<sup>4</sup> that was substantial in terms of both its duration (in that it occupied at least 30 percent of the plaintiff's work time) and nature; and

Second, plaintiff's work duties contributed to [(the function of the vessel) or (the function of an identifiable

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<sup>1</sup>Although the case law refers to "sea" to include all types of navigable water, to avoid jury confusion the term best describing the navigable water at issue in the case should be used in this instruction.

<sup>2</sup>See footnote 1 above.

<sup>3</sup>See footnote 1 above.

<sup>4</sup>Include the "identifiable group" language of the definition only if the evidence supports such an instruction.

group of vessels)<sup>5</sup> or (the accomplishment of (its) or (their))]<sup>6</sup> mission)].

#### **Committee Comment**

See Introduction at 5, above; Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 554 (1997); Chandris, Inc. v. Latsis, 515 U.S. 347, 368-72 (1995); Roth v. U.S.S. Great Lakes Fleet, Inc., 25 F.3d 707, 708-09 (8th Cir. 1994); Miller v. Patton-Tully Transp. Co., Inc., 851 F.2d 202, 204 (8th Cir. 1988); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 510 (8th Cir. 1974); Offshore Co. v. Robison, 266 F.2d 769, 775 (5th Cir. 1959). See also, DiGiovanni v. Traylor Bros., Inc., 939 F.2d 1119, 1121-22, 1123-24 (1st Cir. 1992) (en banc).

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<sup>5</sup>See footnote 4 above.

<sup>6</sup>The word "their" should be used, if the jury is instructed on an identifiable group of vessels. See footnote 4, above.

## 8.16 JONES ACT--"VESSEL" DEFINED

For claims under the Jones Act, the term "vessel" means a structure that has as a major function the transportation or movement across navigable waters. The mere capability of floating or movement across navigable waters is insufficient in itself to render a structure a vessel.

### Committee Comment

See Introduction at 6-8, above. The definition of "vessel" for claims under the Jones Act and for claims under the Longshore and Harbor Workers' Compensation Act relates to the seaman status vel non of the plaintiff and the applicability of one or the other of these statutes. Seaman status depends upon the nature of the work performed by the plaintiff at the time of the alleged incident. In this respect, the scope of the term "vessel" under the Longshore and Harbor Workers' Compensation Act may be broader than that under the Jones Act. See Morehead v. Atkinson-Kiewit, JV, 97 F.3d 603, 607 (1st Cir. 1996) (en banc).



### 8.17 "IN NAVIGATION" DEFINED

A vessel is "in navigation" when, at the time at issue, the vessel was used primarily for the transportation of cargo, equipment or persons across navigable waters, even if at the time of the incident the vessel was not actually engaged in such transportation. Movement of the vessel for a purpose other than its primary use, does not place the vessel "in navigation."

#### **Committee Comment**

See Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997); Chandris, Inc. v. Latsis, 515 U.S. 347 (1995); McDermott Intern., Inc. v. Wilander, 498 U.S. 337 (1991); DiGiovanni v. Traylor Bros., Inc., 939 F.2d 1119, 1121 (1st Cir. 1992) (en banc).

## 8.20 UNSEAWORTHINESS CLAIM AGAINST EMPLOYER

Under maritime law, every shipowner or operator owes to every seaman employed aboard the vessel the non-delegable duty to keep and maintain the vessel, and all decks and passageways, appliances, gear, tools, and equipment of the vessel, in a seaworthy condition at all times.

To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose or the use for which the vessel was provided or intended. An unseaworthy condition may result from the lack of an adequate crew, the lack of adequate manpower to perform a particular task on the vessel, or the improper use of otherwise seaworthy equipment.

Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner-operator is liable for all injuries and damages substantially caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which substantially caused the injury or damage.

However, a shipowner is not required to furnish an accident-free vessel. A vessel is not required to have the best equipment or the finest crew, but only equipment which is reasonably fit for its intended purpose and a crew which is reasonably adequate and competent.

### Committee Comment

See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); Fifth Circuit Pattern Jury Instructions (Civil), § 4.11 (West Group 1999); Ninth Circuit Manual of Model Jury Instructions (Civil), §§ 9.6, 9.7 (West Group. 2001).

## 8.21 UNSEAWORTHINESS CLAIM AGAINST EMPLOYER--ELEMENTS

Your verdict must for plaintiff [and against defendant (name of defendant)]<sup>1</sup> on plaintiff's claim of unseaworthiness, if all the following elements have been proved by the [(greater weight) or (preponderance)]<sup>2</sup> of the evidence:

First, plaintiff was employed by defendant as a seaman on a vessel in navigation<sup>3</sup> at the time [(he) or (she)] suffered injury; and

Second, the vessel on which plaintiff was injured was [(owned) or (operated)] by his employer; and

Third, the defendant's vessel was [\_\_\_\_\_];<sup>4</sup> and

Fourth, the defendant's vessel was thereby rendered unseaworthy; and

Fifth, the unseaworthy condition of the vessel was a substantial factor in causing the injury or damage to the plaintiff.

### Committee Comment

See Eighth Circuit Manual of Model Jury Instructions (Civil), § 7.0 (West Group 2001); Fifth Circuit Pattern Jury Instructions (Civil), § 4.5 (West Group 1999); Ninth Circuit Manual of Model Jury Instructions (Civil), § 9.6 (West Group 2001); Eleventh Circuit Pattern Jury Instructions (Civil), § 6.1 (West Group 2000).

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<sup>1</sup>Use this phrase if there is more than one defendant.

<sup>2</sup>Select the bracketed language that corresponds to the burden-of-proof instruction given.

<sup>3</sup>See Model Jury Instructions, §§ 8.15-8.17 (defining "seaman on a vessel in navigation"), below.

<sup>4</sup>Here state the submitted condition of the vessel.

## 8.22 UNSEAWORTHINESS CLAIM--CAUSATION

An unseaworthy condition of a vessel caused damage or injury, if it was a proximate cause, in that it played a substantial part in bringing about the injury or damage, the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and except for the unseaworthy condition of the vessel the injury or damage would not have occurred. Unseaworthiness may be a proximate cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.

[This standard is different from the causation required for a claim under the Jones Act. Under a Jones Act claim, if you find from the evidence in the case that defendant was negligent, then you must decide whether or not such negligence caused, in whole or in part, any injury or damages suffered by the plaintiff. Negligence may be a cause of damage or injury, even though it operates in combination with the act of another or some natural cause, if the negligence of the defendant played any part in causing the damage or injury.]<sup>1</sup>

### Committee Comments

See Eighth Circuit Manual of Model Jury Instructions (Civil) §§ 7.00 and 7.01 n. 9 (causation under FELA) (West Group 2001); Fifth Circuit Pattern Jury Instructions (Civil), § 4.6 (West Group 1999); Ninth Circuit Manual of Model Jury Instructions (Civil), §§ 9.4, 9.8 (West Group 2001); Eleventh Circuit Pattern Jury Instructions (Civil), § 6.1 (West Group 2000). See also, Alholm v. Am. Steamship Co., 144 F.3d 1172, 1180-81 (8th Cir. 1998).

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<sup>1</sup>Use the bracketed paragraph, if a claim under the Jones Act is submitted to the jury along with an unseaworthiness claim.

**8.30 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT**  
**§ 905(b)--TURN-OVER CLAIM--NEGLIGENCE STANDARD**

Defendant [name of defendant]<sup>1</sup> does not owe plaintiff the duty to provide a seaworthy vessel; defendant [name of defendant] is liable only if defendant was negligent and defendant's negligence was the proximate cause of plaintiff's injury.

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as defendant [name of defendant] must exercise reasonable care before the plaintiff's employer began defendant's operations on the vessel. This means that defendant [name of defendant] must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced [here, insert the type of maritime employment in which plaintiff's employer was engaged on the vessel] would be able, by the exercise of reasonable care, to carry on its work on the vessel with reasonable safety to persons and property.

The defendant [name of defendant] must warn plaintiff's employer of a hazard on the vessel, or a hazard with respect to the vessel's equipment, if (1) defendant [name of defendant] knew about the hazard, or should have discovered it in the exercise of reasonable care, and (2) the hazard was one which was likely to be encountered by plaintiff's employer in the course of its operations in connection with the defendant's vessel, and (3) the hazard was one which plaintiff's employer did not know about, and which would not be obvious to or anticipated by a reasonably competent [here, insert the type of maritime employment in which plaintiff's

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<sup>1</sup>If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

employer was engaged on the vessel] in the performance of its work.

[Even if the hazard was one about which plaintiff's employer (stevedore) knew, or which would be obvious or anticipated by a reasonably competent [here, insert the type of maritime employment in which plaintiff's employer was engaged on the vessel], defendant [name of defendant] must exercise reasonable care to avoid the harm to plaintiff if the hazard was one which defendant knew or should have known plaintiff's employer (stevedore) would not or could not correct and plaintiff could not or would not avoid.]<sup>2</sup>

#### **Committee Comment**

This instruction pertains to a claim that the defendant breached its "turn-over" duty. See Reed v. ULS Corp., 178 F.3d 988, 990-91 (8th Cir. 1999). It should only be used where the vessel owner is not the plaintiff's employer (stevedore). Where the vessel owner is also the plaintiff's employer (stevedore), an instruction should be given consistent with Morehead v. Atkinson-Kiewit, J/V, 97 F.3d 603, 609, 613 (1st Cir. 1996) (en banc), cert. denied, 520 U.S. 1117 (1997).

The standard of care which a vessel operator owes to the plaintiff after the plaintiff's employer began the operations on the vessel is not the subject of this instruction. Such is different from the standard of care owed before the operations began.

See Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 170-72 (1981).

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<sup>2</sup>The Committee believes that the factual circumstances would be infrequent which would warrant this instruction.

**8.31 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT**  
**§ 905(b)--TURN-OVER CLAIM--ELEMENTS OF CLAIM**

Your verdict must be for plaintiff [and against defendant (name of defendant)]<sup>1</sup> [on plaintiff's claim (describe claim)]<sup>2</sup> if all of the following elements have been proved by the [(greater weight) or (preponderance)] of the evidence<sup>3</sup>:

First, plaintiff was engaged in maritime employment and was injured at [(a place within the coverage of the Longshore and Harbor Worker's Compensation Act)<sup>4</sup>]<sup>5</sup>; and

Second,<sup>6</sup> defendant (name of defendant) had defendant's vessel and equipment in such condition that an expert and experienced maritime worker would not be able, by the exercise of reasonable care, to carry on [(his) or (her)] work on the vessel with reasonable safety [in that (describe the conditions and inadequacies at issue)]; and

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<sup>1</sup>Use this phrase if there is more than one defendant.

<sup>2</sup>Include this phrase and identify the claim covered by this elements instruction, if more than one claim is to be submitted.

<sup>3</sup>Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04.

<sup>4</sup>Identify the location of the injury supported by the evidence.

<sup>5</sup>This paragraph must be used in those cases where plaintiff's status as a worker covered by § 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), is at issue. Plaintiff's status as a worker covered by § 905(b) has two components--maritime employment and place of injury. See Introduction. The jury must be instructed with respect to each component of plaintiff's status that is at issue. If the maritime employment segment is included in this instruction, an explanatory instruction on maritime employment must also be given. See Model Instruction No. 8.32. Similarly, if the place of injury segment is included in this instruction, an explanatory instruction on place of employment must also be given. See Eighth Circuit Manual of Model Jury Instructions (Civil) §8.33.

<sup>6</sup>If the instruction with respect to plaintiff's status as a worker covered by § 905(b) is omitted, the paragraph numbers should accordingly be modified and this should read "First."

Third, defendant [(name of defendant)] in any one or more of the ways described in Paragraph (Second)<sup>7</sup> was negligent<sup>8</sup>; and<sup>9</sup>

Fourth, such negligence was the proximate cause of [(injury to plaintiff) or (the death of (name of decedent))].

If any of the above elements has not been proven by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant [(name of defendant)].<sup>10</sup>

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<sup>7</sup>Use the appropriate paragraph number corresponding to the paragraph number describing the claimed deficiencies to the defendants' vessel or equipment.

<sup>8</sup>The terms "negligent" and "negligence" must be defined. See Eighth Circuit Manual of Model Jury Instructions (Civil) § 8.12.

<sup>9</sup>If only one phrase describing defendant's breach of duty is submitted in Paragraph Second, then Paragraph Third should read as follows:

Third, defendant [(name of defendant)] was thereby negligent, and

<sup>10</sup>This paragraph should not be used if the jury is given a specific instruction on defendant's theory of the case.



## 8.32 "MARITIME EMPLOYMENT" DEFINED

A person is engaged in maritime employment if at the time of [(his) or (her)] injury, the person is either

(1) injured while engaged in an essential part of the loading or unloading process of a vessel<sup>1</sup>; or

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<sup>1</sup>When supported by the evidence, the court may be required to instruct the jury that certain workers who meet the general definition of "employee" under the Longshore and Harbor Workers' Compensation Act have been explicitly excluded from coverage by 33 U.S.C. § 902(3)(A)-(H). Section 902(3) and 33 U.S.C. § 902(4) provide:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

(A) individuals employed exclusively to perform office, clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §§ 902(3), 902(4).

(2) on actual navigable waters in the course of that person's employment on those waters; or

(3) working as a harbor worker, including a ship repairman, shipbuilder, or shipbreaker.

**Committee Comment**

This instruction must be given if the issue of maritime employment is submitted to the jury in Paragraph First of the general negligence instruction, Model Instruction No. 4.31, above.

See Fifth Circuit Pattern Jury Instructions (Civil), § 4.13 (West Group 1999).

**8.33 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT**  
**"COVERED PLACE OF INJURY" DEFINED**

A person is injured at a place within the coverage of the Longshore and Harbor Workers' Compensation Act if the injury occurs on navigable waters, in an area adjoining navigable waters, or in an area that is contiguous with an area adjoining navigable waters and that is customarily used by an employer in the loading, unloading, building, or repairing of a vessel.

**Committee Comment**

This instruction must be given if the issue of the place of injury is submitted to the jury in Paragraph First of the General Negligence Instruction, Eighth Circuit Manual of Model Jury Instructions (Civil) § 8.31.

See Fifth Circuit Pattern Jury Instructions (Civil), § 4.134 (West Group 1999). An additional instruction may be needed, if there is an issue over whether the plaintiff is excluded from coverage under 33 U.S.C. § 902(3). See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

### 8.34 "NAVIGABLE WATERS" DEFINED

The term "navigable waters" as used in these instructions means a body of water which in its ordinary condition is presently capable of serving as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water.

#### Committee Comment

See The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); Three Buoys Houseboat Vacations, U.S.A. Ltd. v. Morts, 921 F.2d 775, 778-79 (8th Cir. 1990), cert. denied, 502 U.S. 898 (1991); Livingston v. United States, 627 F.2d 165, 168-69 (8th Cir. 1980).

This instruction must be given if the issue of whether the place of injury was on navigable waters is submitted to the jury in Paragraph First of the General Negligence Instruction, Model Instruction No. 8.31.

### 8.35 "PROXIMATE CAUSE" DEFINED

As used in these instructions, the term "proximate cause" means a cause of damage or injury that played a substantial part in bringing about the injury or damage. The injury or damage must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the injury or damage would not have occurred.

A cause may be a proximate cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the subject cause contributes substantially to producing the damage or injury.

#### **Committee Comment**

See Britton v. U.S.S. Great Lakes Fleet, Inc., 302 F.3d 812, 818 (8th Cir. 2002); Eleventh Circuit Pattern Jury Instructions (Civil), § 6.1 at 230 (West Group 2000).

**8.40 GENERAL MARITIME LAW--**  
**NONEMPLOYEE-INVITEE'S NEGLIGENCE CLAIM--**  
**ELEMENTS**

Your verdict must be for plaintiff [and against defendant (name of defendant)],<sup>1</sup> if all the following elements have been proved by the [(greater weight) or (preponderance)]<sup>2</sup> of the evidence:

First, plaintiff was lawfully aboard the vessel; and

Second, while plaintiff was lawfully aboard the vessel, defendant [here describe the alleged act or omission]; and

Third, defendant in any one or more of the respects submitted in paragraph Second was negligent<sup>3</sup>; and

Fourth, as a direct result of such negligence, plaintiff sustained injury.

**Committee Comment**

See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

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<sup>1</sup>Use this phrase if there is more than one defendant.

<sup>2</sup>Select the bracketed language that corresponds to the burden-of-proof instruction given.

<sup>3</sup>Define "negligence" under the ordinary reasonable care standard. See Eighth Circuit Manual of Model Jury Instructions (Civil) §§ 7.09-7.11, below, without the bracketed language. See also Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959).

**8.41 GENERAL MARITIME LAW--NONEMPLOYEE-INVITEE'S CLAIM--  
CONTRIBUTORY NEGLIGENCE (COMPARATIVE FAULT)**

If you find in favor of plaintiff under Instruction No. \_\_\_\_ (here insert the number of plaintiff's elements instruction or verdict director), you must consider whether plaintiff [(name of decedent)] was also negligent. Under this Instruction, on plaintiff's [here identify the claim to which this instruction applies] claim, whether or not defendant was partly at fault, you must assess to [(plaintiff) or (name of decedent)] a percentage of the total negligence, if all the following elements have been proved by the [(greater weight) or (preponderance)] of the evidence:

First, [(plaintiff) or (name of decedent)] (describe the evidenced negligent conduct); and

Second, [(plaintiff) or (name of decedent)] was thereby negligent<sup>1</sup>; and

Third, such negligence of [(plaintiff) or (name of decedent)] resulted in whole or in part in [(his) or (her)] own injury or damage.

The total of the negligence of [(plaintiff) or (name of decedent)] and of the negligence of the defendant for causing (plaintiff's) or (decedent's) injury must equal 100 percent.

**Committee Comments**

See Ballard v. River Fleets, Inc., 149 F.3d 829, 831 (8th Cir. 1998).

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<sup>1</sup>Define "negligence" under the ordinary reasonable care standard. See Eighth Circuit Manual of Model Jury Instructions (Civil) §§ 7.09-7.11, below, without the bracketed language. See also Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959).

## **8.81 COMPENSATORY DAMAGES**

If you find the issues in favor of plaintiff, you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe [(he) or (she)] sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence.

You should consider the following elements of damages, to the extent you find that such was established by the [(preponderance) or (greater weight)] of the evidence: physical pain and suffering; mental anguish; income loss in the past; impairment of earning capacity or ability in the future; and the reasonable value, not exceeding the actual cost to plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question. Such damages cannot be based on speculation.

### **Committee Comment**

See Fifth Circuit Pattern Jury Instructions (Civil), § 4.8 (West Group 1999).



### **8.81A COMPENSATORY DAMAGES (COMPARATIVE FAULT ALTERNATE)**

If you find in favor of plaintiff, then you must determine the entire amount of money which you believe will fairly and justly compensate plaintiff for any damages you believe [(he) or (she)] sustained and is reasonably certain to sustain in the future as a result of the incident mentioned in the evidence. If liability is determined, you will then assess the percentages of fault (from zero to 100 percent) for which each party is responsible which caused the damages determined. Do not reduce or increase any amount of damages you find by any percentage of fault that you find.

You should consider the following elements of damages, to the extent you find that such was established the (preponderance) or (greater weight)] of the evidence: physical pain and suffering; mental anguish; income loss in the past; impairment of earning capacity or ability in the future; and the reasonable value, not exceeding the actual cost to the plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question. Such damages cannot be based on speculation.

#### **Committee Comment**

See Fifth Circuit Pattern Jury Instructions (Civil), §§ 4.7, 4.8 (West Group 1999).

## 8.82 PRESENT VALUE OF FUTURE DAMAGES

If you should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes either (1) a reasonable likelihood of future medical expense, or (2) a reasonable likelihood of loss of future earnings, then the jury must ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not be sustained until some future date.

Under these circumstances, the result is that plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which [(he) or (she)] would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires that the jury discount, or reduce, to its present worth, the amount of the anticipated future loss, by considering (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth, that is, the reduced amount of anticipated future loss.

### Committee Comment

See Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (7th Cir. 1974).

### 8.83 COMPENSATORY DAMAGES NOT TAXABLE

In the event that you determine to award the plaintiff money damages, you are instructed that the award is not subject to any federal or state income taxes. Therefore, you may not consider such taxes in considering any award of damages.

#### Committee Comment

See Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980) (instruction is mandatory); Fanetti v. Hellenic Lines, Ltd., 678 F.2d 424, 431 (2nd Cir. 1982); cf. Flanigan v. Burlington N., Inc., 632 F.2d 880, 889 (8th Cir. 1980).

#### 8.84 DUTY TO MITIGATE DAMAGES

It is the duty of any person who has been injured to use reasonable diligence and reasonable means, under the circumstances, to prevent the aggravation of such injury to act in a way that brings about a recovery from such injury and to take advantage of any reasonable opportunity [(he) or (she)] may have to reduce or minimize loss or damage. [(He) or (She)] is required to obtain reasonable medical care and follow [(his) or (her)] doctor's reasonable advice and to seek out or take advantage of a business or employment opportunity that was reasonably available to [(him) or (her)] under all the circumstances shown by the evidence. You should reduce the amount of plaintiff's damages by the amount [(he) or (she)] could have avoided by obtaining and following reasonable medical care and advice or the amount that plaintiff could have reasonably realized if [(he) or (she)] had taken advantage of such business or employment opportunity, but did not do so.

#### Committee Comment

See Rapisardi v. United Fruit Co., 441 F.2d 1308, 1312 (2d Cir. 1971); Saleeby v. Kingsway Tankers, Inc., 531 F. Supp. 879, 891 (S.D.N.Y. 1981).

## 8.85 "MAINTENANCE" AND "CURE" DEFINED

As used in these instructions, the term "maintenance" means the cost of food and lodging that the plaintiff has actually incurred that is reasonable for a person in [(his) or (her)] community or is reasonably necessary for survival, whichever is less, and the reasonable cost of any necessary transportation to and from a medical facility.

As used in these instructions, the term "cure" means the cost of necessary medical attention, including the services of physicians and nurses as well the cost of hospitalization, medicines and medical apparatus.

### Committee Comment

See Introduction at 11-12; Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938); Hall v. Noble Drilling (U.S.) Inc., 242 F.3d 582 (5th Cir. 2001); Wactor v. Spartan Transp. Corp., 27 F.3d 347, 351-52 (8th Cir. 1994) (definitions of "maintenance" and "cure"; failure of seaman to disclose medical information before employment may be a defense to maintenance and cure); Stanislowski v. Upper River Servs., Inc., 6 F.3d 537, 540 (8th Cir. 1993); Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 946 (9th Cir. 1986).

## **8.86 MAINTENANCE AND CURE--SUPPLEMENTAL**

A seaman is entitled to recover maintenance and cure, if [(he) or (she)] becomes injured or ill, without willful misbehavior on [(his) or (her)] part, while in the service of [(his) or (her)] employer's vessel. A seaman is entitled to maintenance and cure even though [(he) or (she)] was not injured as a result of any negligence on the part of [(his) or (her)] employer or as a result of the unseaworthiness of the employer's vessel. Moreover, the seaman's injury or illness need not be work-related. It need only occur while the seaman was in the service of [(his) or (her)] employer's vessel. Furthermore, an award for maintenance and cure must not be reduced because of any negligence on the part of plaintiff.

A seaman is entitled to receive maintenance and cure from the date [(he) or (she)] leaves the vessel until [(he) or (she)] reaches "maximum medical cure." The term "maximum medical cure" means the point at which no further improvement in the seaman's medical condition is reasonably expected. Thus, if it appears that a seaman's condition is incurable, or that treatment will only relieve pain or provide comfort but will not improve the seaman's physical condition, [(he) or (she)] has reached maximum medical cure.

If you find that plaintiff is entitled to an award of damages under [either] the Jones Act [or on an unseaworthiness claim] and if you award [(him) or (her)] lost wages or medical expenses, then you may not also award plaintiff maintenance and cure for the same period of time, because plaintiff may not recover twice for the same loss of wages or medical expenses.

### **Committee Comment**

A seaman's claim for maintenance and cure is separate and distinct from a claim under the Jones Act or for the

unseaworthiness of a vessel. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943); Britton v. U.S.S. Great Lakes Fleet, Inc., 302 F.3d 812, 816-18 (8th Cir. 2002).

## 8.90 SPECIAL INTERROGATORIES<sup>1</sup>

### I.

#### NEGLIGENCE CLAIM

1. Was (name of plaintiff or decedent) a seaman at the time of the incident shown in the evidence?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 1 is "Yes," proceed to Interrogatory No. 2. If the answer to No. 1 is "No," do not answer any more interrogatories on this form. The Foreperson must sign this form and return it into court.]

2. Was (name of plaintiff or decedent) injured in the course of [(his) or (her)] employment as a seaman?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 2 is "Yes," proceed to Interrogatory No. 3. If the answer to No. 2 is "No," do not answer any more interrogatories on this form, but the Foreperson must sign this form and return it into court.]

3. Did defendant [here describe the act or omission submitted by the plaintiff]?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 3 is "Yes," proceed to Interrogatory No. 4. If the answer to No. 3 is "No," do not answer No. 4, but proceed to No. 7.]

4. Was the act of defendant found with respect to No. 3 negligent?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 4 is "Yes" proceed to Interrogatory No. 5. If the answer to No. 4 is "No," do not answer No. 5, but proceed to No. 7.]

5. Did any such negligent act or negligent omission of defendant, found by the jury with respect to Interrogatory No. 4, cause injury to plaintiff?

Answer: \_\_\_\_\_ (Yes or No)

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<sup>1</sup>In an appropriate case, the court may submit the case to the jury with a general verdict form.



[If the answer to Interrogatory No. 5 is "Yes," proceed to Interrogatory No. 6. If the answer to No. 5 is "No," do not answer No. 6, but proceed to No. 7.]

6. What is the total amount of damages that plaintiff has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence?

Answer: \_\_\_\_\_Dollars (\$\_\_\_\_\_).

## II.

### UNSEAWORTHINESS CLAIM

7. At the time and place established in the evidence, was the vessel (here name the subject vessel) in an unseaworthy condition in that it (here state condition of vessel submitted by plaintiff)?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 7 is "Yes" proceed to Interrogatory No. 8. If the answer to No. 7 is "No," proceed to No. 10.]

8. Was the unseaworthy condition of the subject vessel, found by the jury with respect to No. 7, a substantial factor in causing any injury or damage sustained by plaintiff?

Answer: \_\_\_\_\_ (Yes or No)

[If the answer to Interrogatory No. 8 is "Yes" proceed to Interrogatory No. 9. If the answer to No. 8 is "No," do not answer No. 9, but proceed to No. 10.]

9. What is the total amount of damages which plaintiff has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence?

Answer: \_\_\_\_\_Dollars  
(\$\_\_\_\_\_).

## III.

### COMPARATIVE NEGLIGENCE DEFENSE

(Plaintiff, Defendant, and Settling Defendant)

10(a). Do you, the jury, find that defendant  
[\_\_\_\_\_] <sup>2</sup> [\_\_\_\_\_] <sup>3</sup> and  
thereby was negligent?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to No. 10(a) is "Yes," answer No. 10(b).  
If the answer to No. 10(a) is "No," do not answer any more of  
the interrogatories. The Foreperson must sign the form and  
return it into court.]

10(b). Do you, the jury, find that the negligence found  
by the jury in its answer to No. 10(a), above, caused, in  
whole or in part, damage or injury to plaintiff?

Answer: \_\_\_\_\_ (Yes or No).

[Note: If the answer to No. 10(b) is "Yes," answer No. 11(a).  
If the answer to No. 10(b) is "No," do not answer any more of  
the interrogatories. The Foreperson must sign the form and  
return it into court.]

11(a). Do you, the jury, find that plaintiff  
[\_\_\_\_\_] <sup>4</sup> [\_\_\_\_\_] <sup>5</sup> and  
thereby was negligent?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 11(a) is "Yes,"  
answer No. 11(b). If the answer to No. 11(a) is "No," do not  
answer No. 11(b), but proceed to answer No. 12(a).]

11(b). Do you, the jury, find that the negligence of  
the plaintiff, found in the answer to No. 11(a), caused, in  
whole or in part, damage or injury to plaintiff?

Answer: \_\_\_\_\_ (Yes or No).

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<sup>2</sup>Here name the defendant.

<sup>3</sup>Here state the act of negligence submitted by the plaintiff.

<sup>4</sup>Here name the plaintiff.

<sup>5</sup>Here state the act of negligence submitted by the defendant.

12(a). Do you, the jury, find that [\_\_\_\_\_] <sup>6</sup>  
[\_\_\_\_\_] <sup>7</sup> and thereby was  
negligent?

Answer: \_\_\_\_\_ (Yes or No)

[Note: If the answer to Interrogatory No. 12(a) is "Yes,"  
answer No. 12(b). If the answer to No. 12(a) is "No," do not  
answer No. 12(b), but proceed to answer No. 13.]

12(b). Do you, the jury, find that the negligence found  
by the jury in its answer to No. 12(a) caused, in whole or in  
part, caused damage or injury to plaintiff?

Answer: \_\_\_\_\_ (Yes or No).

13. What percentage(s) of the relative fault for  
plaintiff's damages are assessed

(a) to defendant (name of defendant)? \_\_\_\_\_ %

(b) to plaintiff (name of plaintiff)? \_\_\_\_\_ %

(c) to (name of settling defendant)? <sup>8</sup> \_\_\_\_\_ %.  
[TOTAL MUST EQUAL 100%] 100 %

14. Without regard to any percentage found with respect  
to Interrogatory No. 13, what are the total compensatory  
damages, if any, you, the jury, find that plaintiff  
\_\_\_\_\_ suffered and is reasonably certain to suffer in  
the future as a direct result of the acts found with respect  
to the jury's answers to Interrogatories Nos. 10(b), 11(b),  
and 12(b)?

Answer: \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

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<sup>6</sup>Here name the settling defendant.

<sup>7</sup>Here state the act of negligence submitted by the plaintiff or the non-  
settling defendant.

<sup>8</sup>See footnote 6.